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No. 05-595

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2005

GLEN WHORTON, DIRECTOR,
NEVADA DEPARTMENT OF CORRECTIONS, Petitioner

v.

MARVIN HOWARD BOCKTING, Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

FRANNY A. FORSMAN
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Counsel for Respondent

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GLEN WHORTON, DIRECTOR,
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v.

MARVIN HOWARD BOCKTING, Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Respondent Marvin Howard Bockting, asks for leave to file the attached Opposition to Petition for Writ of Certiorari, without prepayment of costs and to proceed in *forma pauperis.* Respondent has been granted leave to so proceed in the District Court and in the United States Court of Appeals. No affidavit is attached, inasmuch as the District Court appointed counsel for Respondent under the Criminal Justice Act of 1964, 18 U.S.C. §3006A. *See* Supreme Court Rule 39.1.

Dated this 12th day of December 2005.

Respectfully submitted,

FRANNY A. FORSMAN
Federal Public Defender
Counsel for Respondent

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STATEMENT OF THE CASE

Procedural History

Marvin Bockting went to trial in Las Vegas Nevada and was found guilty by a jury of three counts of sexual assault and acquitted of one count of sexual assault of his stepdaughter, who was seven years old at the time of the trial. Bockting was sentenced to three life sentences, two of the sentences to run consecutively.

Bockting appealed his conviction to the Nevada Supreme Court raising only two issues: 1) the constitutionality of admitting the hearsay statements of the child witness; 2) the denial of defendant's motion to prevent the mother of the child from testifying. The Nevada Supreme Court dismissed the appeal on June 22, 1989. A Petition for Writ of Certiorari was filed with the U.S. Supreme Court and the case was remanded for reconsideration in light of Idaho v. Wright, 497 U.S. 805, 110 S. Ct. 3139, 111 L.Ed. 2d 638 (1990). The Nevada Supreme Court reconsidered its decision and entered an Opinion affirming the conviction on March 8, 1993. Bockting filed a Petition for Post Conviction Relief in the state court on March 30, 1994 setting forth specific factual issues with regard to his Ineffective Assistance of Counsel claims. On July 6, 1994, the state court held an ex parte evidentiary hearing at which testimony was taken from Bockting's trial counsel. Bockting was not transported to court, was not represented and was not present. The court denied the Petition on September 15, 1994. Bockting appealed and the Nevada Supreme Court entered an Order Dismissing that Appeal on December 24, 1997.

Bockting filed a Petition for Writ of Habeas Corpus in federal court on December 30, 1998. Bockting filed a Second Amended Petition for Writ of Habeas Corpus on May 17, 2000. The

district court, without holding a hearing or appointing counsel, denied the Petition in a written Order on March 22, 2002.

Counsel was appointed by the Ninth Circuit Court of Appeals to represent Bockting on appeal. The case was briefed and argument was heard on January 14, 2004. On March 8, 2004, before a decision was rendered, the case of Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354 (2004) was decided by this court. Supplemental briefing was filed and on February 22, 2005, the panel filed an Opinion granting Bockting's Petition for a Writ of Habeas Corpus. A Petition for Rehearing and Suggestion for Rehearing En Banc was filed by the Attorney General. On June 1, 2005, an Amended Opinion was filed by the original panel and Rehearing and En Banc consideration was denied.

Factual Summary

The Ninth Circuit summarized the facts pertinent to the Crawford issue as follows:

> Marvin Bockting's conviction for sexual abuse and life sentences stem from a trial in which the only witness to the conduct, his six-year old stepdaughter, Autumn Bockting, did not testify at trial, but whose interview with a detective was admitted as key evidence. Bockting v. Bayer, 399 F.3d 1010, 1012 (2005).

Autumn testified at the Preliminary Hearing but her testimony was inconsistent with regard to when or how the incident with her stepfather happened. Detective Zinovitch, who had received "on-the-job training with other more experienced detectives within the sexual assault unit," testified at the Preliminary Hearing that contact with the Police Department was not made until January 19, 1988, two days after the date Laura Bockting said that Autumn told her about the incident with her stepfather. On January 21, 1988, the detective interviewed Autumn at his office. He picked up Autumn and her mother and transported them to his office. He described Autumn

as "very talkative" and not frightened. The detective testified that Autumn described the same events that her mother testified to. The detective also testified that Autumn demonstrated the events with the use of anatomical dolls.

The prosecutor convinced the trial court that the child need not testify on the following grounds:

> My position is that the circumstances surrounding the giving of these statements in that they were unsolicited, to the extent that the statement given to Laura Bockting, the mother, was an unsolicited voluntary spontaneous-type statement, so I am satisfied. At least, I think that the State has met its burden that that is a genuine statement should be admitted.
>
> And also the statement to Detective Zinovitch because here is an experienced investigator, hundreds of sexual assault victims, and he is of the opinion that she was telling the truth and can even give reasons as to why he thinks she is telling the truth. So I think the guarantees of trustworthiness are sufficiently there.

The court ruled in pertinent part as follows:

> Concerning the reliability of the statements to Mrs. Bockting and Detective Zinovitch, looking at the statements isolated and on their own merit, I see no difficulty concerning their reliability.
>
> There does not seem to be a fabrication here in that they are not irrational or not plausible. They follow chronologically the events. They tell what the little girl's perception of it was and it seems to be credible, although I grant at the preliminary hearing there is a different version.
>
> I don't know what motivation it would be to misrepresent this, either. I have heard nothing in that regard...
>
> But concerning the law, strictly speaking, Mr. Blaskey has brought some cases to our attention here...which suggests that a 13-year old or two 13-year girls were assaulted and that witnesses were allowed to testify behind screens. I think that is a rather remarkably different situation than we have here.
>
> This statute indicates that a child under 10 years of age shall be allowed certain latitudes in their testimony. That, I think, is a very telling and very critical point to make.

> The very purpose of this statute was to avoid the problem we have here today where a little girl either is not willing to testify or for some reason is unable to or **testifies in such an inconsistent manner that it means, in essence, that their testimony is worthless**; and because of the fact that she is testifying in open court in front of strangers with all the things that surrounds that kind of setting.
>
> And this law was set in place, I think, to avoid some of the problems involved there with that kind of a testimony situation. **There seems to be nothing that would take our case out of the typical situation that the law had contemplated.** [emphasis added] .

The jury was permitted to hear Detective Zinovitch's recitation of the child's statements to him. Then the prosecutor called a "marriage and family therapist" to testify that she saw Autumn once a week starting in March 1988 based on a referral from the District Attorney's office. The "therapist" said that "Autumn appears not to want to deal with the sexual abuse. She doesn't want to talk about it. **She doesn't want to acknowledge that it happened.**" [emphasis added] .

Laura Bockting, an exotic dancer when she married Marvin Bockting in 1984 testified that the couple separated for eight months due to her alcohol and drug problems until two months before the claimed molestation in January, 1988. In January of 1988, the relationship between Laura and Marvin was described by Laura as "not happy" and they were arguing. Laura testified that the first thing she said to Marvin the day after Autumn talked to her on January 17th was "where is the money for the rent." She took the money, left Autumn with Marvin alone and paid the rent. When she returned, she confronted Marvin, and he denied any wrongdoing. Laura told Marvin she was going to take Autumn to be "checked" and Marvin said "I hope you do. I want you to." Laura said she waited two days to take Autumn to the hospital but she couldn't remember why she waited. She

said that calling the police department "never entered my mind." Laura did not testify that Autumn experienced painful urination or other pain in her vaginal or rectal area at any time.

There was medical evidence adduced at trial, although the defense did not hire an expert to prepare for or test the evidence. Dr. Stacy Rivers testified that her examination of Autumn revealed "a small tear that seemed to be healed–healing, I should say, and it was not bleeding at that time." She testified that "within a week there had been a tear of the rectal mucosa." She also found that the hymen was "gaping wide open although it was not bleeding" She testified that there was no other lacerations within the canal of the vagina or the rectum. She testified that the stretching of the hymen, had it occurred just prior to the examination would have caused pain to the area and painful urination during that time.

As he did at trial, Marvin Bockting has maintained his innocence throughout these proceedings.

REASONS FOR DENYING THE PETITION

I.

CERTIORARI SHOULD NOT BE GRANTED BECAUSE THE NINTH CIRCUIT'S DECISION FALLS SQUARELY WITHIN THE "THE NARROW CLASS OF RULES" WHICH DESERVE TO BE GIVEN RETROACTIVE EFFECT.

The Petitioner argues against giving retroactive effect to Crawford by claiming that, under Teague v. Lane,489 U.S. 288 (1989), the class of rules deserving retroactive effect should be so exceedingly small that new rules of procedure would almost never apply. Petitioner emphasizes a statement by this court in Schriro v. Summerlin, 542 U.S. 348, 124 S.Ct. 2519, 2523 (2004) that the "class of rules (deserving retroactive effect) is extremely narrow, and 'it is unlikely that any...has yet

to emerge.'" (quoting Tyler v. Cain, 533 U.S. 656, 667 n.7 (2001)). Petitioner argues that because the Summerlin decision was issued "well *after* Crawford" [three and a half months] (Petition, p. 14) the statement from Summerlin is somehow instructive on the retroactivity of Crawford. The Bockting Panel considered the Appellee's argument and rejected it as follows:

> Admonitions such as in Summerlin offer discouragement but no guidance. Because our job is not to conjure up hidden meaning [as Appellees now request] we simply heed the warning and our analysis thus adheres faithfully to the holding and rationale of Summerlin.

Bockting, 399 F.3d at 1016.

The Ninth Circuit decision in this case relied upon the reasoning and analysis in Summerlin to support its conclusion that Crawford should be given retroactive effect: "[j]uxtaposed, Summerlin actually underscores why the Crawford rule implicates the "fundamental fairness and accuracy of the criminal proceeding..." Bockting, 399 F.3d at 1016. Although Teague and its progeny set a strong presumption in favor of nonretroactivity, the bar is not absolute. Crawford's cross-examination requirement meets the Supreme Court's retroactivity criteria.

Unlike other cases involving important constitutional rights, including Ring, Crawford's impact on the accuracy of criminal proceedings is unequivocal. If Crawford does not fit within the class of retroactive procedural rules, it would be hard to conjure up a rule that would.

The language of this court in Crawford provides the best evidence that the Supreme Court saw the rule as essential to an accurate and fair proceeding:

Accuracy of the Trial

> Nothing can be more essential than the cross examining [of] witnesses...124 S.Ct. at 1362.

We do not read the historical sources to say that a prior opportunity to cross-examine was merely a sufficient, rather than a necessary, condition for admissibility of testimonial statements. They suggest that this requirement was dispositive, and not merely one of several ways to establish reliability. 124 S.Ct. at 1366-67.

...the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined. 124 S.Ct. at 1370.

The ambiguity of [the hearsay statements] made it all the more imperative that they be tested to tease out the truth. 124 S.Ct. at 1373.

...we view this as one of those rare cases in which the result below is so improbable that it reveals a fundamental failure on our part to interpret the Constitution in a way that secures its intended constraint on judicial discretion. 124 S.Ct. at 1373.

Indeed, cross-examination is a tool used to flesh out the truth, not an empty procedure. 124 S.Ct. at 1377 (Concurring Opinion)

Bedrock Principles Essential to Fairness of the Proceeding

The Sixth Amendment's Confrontation Clause provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him." We have held that this bedrock procedural guarantee applies to both federal and state prosecutions. 124 S.Ct. at 1359.

"[I]t is a rule of the common law, founded on natural justice, that no man shall be prejudiced by evidence which he had not the liberty to cross examine." 124 S.Ct. at 1363

...one of the "indispensable conditions" implicitly guaranteed by the State Constitution was that "prosecutions be carried on to the conviction of the accused, by witnesses confronted by him, and subjected to his personal examination." 124 S.Ct. at 1363.

> "The substance of the constitutional protection is preserved to the prisoner in the advantage he has once had of seeing the witness face to face, and of subjecting him to the ordeal of cross-examination. This, the law says, he shall under no circumstances be deprived of...." 124 S.Ct. at 1367.
>
> Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation. 124 S.Ct. at 1374.

In this case, Petitioner was convicted primarily on the basis of the wholly un-cross-examined statements of the alleged victim. Applying the Crawford rule here would clearly reduce the "impermissibly large risk that [an] innocent [man] was convicted," and "implicate[s] the fundamental fairness of the trial." Sanchez-Cervantes, 282 F.3d at 668-669; see Dutton v. Evans, 400 U.S. 74, 89 (1970)(right of cross-examination "helps ensure the 'accuracy of the truth-determining process' [citations omitted]"); Pointer v. Texas, 380 U.S. at 405 (cross-examination is "essential and fundamental for...fair trial.").

II.

THE ISSUE RAISED IN REASON (III) OF THE PETITION SHOULD NOT BE DECIDED IN THIS CASE AS THE ISSUE WAS NEVER RAISED OR LITIGATED BELOW.

The Attorney General argues for the first time in this Petition that the decision by the Ninth Circuit "created a split among the Circuits by ruling that 28 U.S.C. §2254(d)(1) and (2) adopted the *Teague* exceptions. The Attorney General had the opportunity to make this argument in Appellee's Supplemental Brief filed pursuant to the Ninth Circuit's order after the Crawford decision and in Appellee's Petition for Rehearing and Suggestion for Rehearing En Banc. Now the Attorney General contends that the Ninth Circuit erroneously conducted a Teague retroactivity inquiry. The

Attorney General urged the Ninth Circuit on two separate occasions to conduct a Teague analysis of the retroactivity question and never made the argument which is made in the Petition for Writ of Certiorari that conducting such an inquiry would be a "misinterpretation" of the statute.

The Attorney General cites to Gosier v. Welborn, 175 F.3d 504, 510 (7th Cir. 1999) and Ramdass v. Angelone, 187 F.3d 396, 406-7 (4th Cir. 1999) for the proposition that the decision by the Ninth Circuit in this case created a split among the Circuits on this statutory construction issue. Both cases were decided before the Opinion rendered by this court in Horn v. Banks, 536 U.S. 266, 272, 122 S.Ct. 2147, 2151 (2002) which held, "in addition to performing any analysis required by AEDPA, a federal court considering a habeas petition must conduct a threshold *Teague* analysis when the issue is properly raised by the state."

The Ninth Circuit conducted the analysis called for by this court, and asked for, by the Attorney General. "We ordinarily will not decide questions not raised or litigated in the lower courts." City of Springfield, Mass. v. Kibbe, 480 U.S. 257, 259, 107 S.Ct. 1114, 1116 (1987).

CONCLUSION

Granting of Certiorari is not warranted in this case on the issue of the retroactivity of the Crawford decision to cases pending collateral review because the decision falls squarely within the holdings of this court in Teague and Schriro. The reasoning in the Crawford decision itself demonstrates that the Ninth Circuit correctly understood that this court in Crawford intended to change the "bedrock procedural elements essential to the fairness of the proceeding."

. . .

. . .

This court should not consider Petitioners third reason for the granting of Certiorari as the issue of the interpretation of the statute was not raised or litigated below.

Respectfully submitted:

By: _____
FRANNY A. FORSMAN
Federal Public Defender

CERTIFICATE OF SERVICE

GLEN WHORTON, DIRECTOR, NEVADA DEPARTMENT OF CORRECTIONS,
Petitioner,

Petitioner,

v.

MARVIN HOWARD BOCKTING,

Respondent.

The undersigned hereby certifies that she is an employee in the office of the Federal Public Defender for the District of Nevada and is a person of such age and discretion as to be competent to serve papers.

That on December 12, 2005, she served a copy of the attached Opposition to Petition for Writ of Certiorari and Motion to Proceed in Forma Pauperis by personally placing a copy in the United States mail, postage paid to the addresses named below:

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Bonnie S. Box

Bonnie S. Box, Secretary